LE COPY

Office - Supreme Court,
FILED
OCT 19 1953
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 420

MEYER SCHWARTZ, HAROLD L. COLEMAN, DAVID LEFFERMAN, ET AL.,

Appellants,

vs.

JOHN C. KELLEY, GOODWIN B. BEACH AND T. EMMET CLARIE, MEMBERS OF THE LIQUOR CONTROL COMMITTEE OF THE STATE OF CONNECTICUT

APPEAL FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

STATEMENT AS TO JURISDICTION

ABRAHAM DAVIS SLAVITT,
Counsel for Appellants.

SLAVITT AND CONNERY,
Of Counsel.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statement of the case	1
Opinions below	3
Statutory provision sustaining jurisdiction	3
Statute of the state involved	3
Date of judgment and of application for appeal	3
Cases believed to sustain jurisdiction	4
Raising the federal questions	4
Statement of the grounds upon which it is contended the questions involved are substantial	5
Public Act Number 200 has a direct, immediate and proximate effect on interstate commerce and is therefore within the scope of the Sherman Act	5
State statutes which attempt to regulate and enforce price fixing of goods in interstate commerce in contradiction to the federal anti-trust laws are unconstitutional	7
Conclusion	12
Appendix "A"—Opinion of the Superior Court of the State of Connecticut—Filed June 9th, 1952	13
Appendix "B"—Opinion of the Supreme Court of Errors of Connecticut—July 21st, 1953	19

Table of Cases Cited

Bethlehem Steel Company v. *New York State Labor Relations Board*, 330 U. S. 767, 67 Sup. Ct. 1026	4
Gibbs v. *Burke*, 337 U. S. 773, 69 Sup. Ct. 1247	4
LaCrosse Telephone Corporation v. *Wisconsin Employment Relations Board*, 336 U. S. 18, 69 Sup. Ct. 379	4
Lochner v. *People of New York*, 198 U. S. 45	12
National League, etc. v. *Federal Baseball Club*, 259 U. S. 200, 66 L. Ed. 898	6

Page

Parker v. *Brown*, 317 U. S. 341 9
Primkemp v. *Florida*, 328 U. S. 331, 66 Sup. Ct. 1029 4
Schwegmann Brothers v. *Calvert Distillers Corporation*, 341 U. S. 384 8
Shelley v. *Kraemer*, 334 U. S. 1, 69 Sup. Ct. 836 4
Turner v. *Pennsylvania*, 338 U. S. 62, 69 Sup. Ct. 1352 4
Tyson v. *Benton*, 273 U. S. 418 12
United States v. *Frankfort Distilleries*, 324 U. S. 293, 89 L. Ed. 951 12
United States General Motors Corporation, 121 Fed. 2d 376 6
United States v. *National Retail Lumber Dealers Association*, 40 Fed. Supp. 448 6
United States Automobile Workers v. *O'Brien*, 339 U. S. 454, 70 Sup. Ct. 781 4
Wolff v. *Colorado*, 338 U. S. 25, 69 Sup. Ct. 1359 4

STATUTES AND OTHER AUTHORITIES CITED

Constitution of the United States, Fourteenth Amendment 3
Federal Trade Commission Act, 15 U.S.C.A. Section 45, "The McGuire Act" 8
New York State Alcoholic Beverage Control Law, entitled "Minimum Consumer Resale Prices," Section 101 (c) 11
Public Act Number 200 (General Statutes of Connecticut, Cumulative Supplement 1951 Sections 904b—907b), "An Act Concerning the Posting of Prices of Alcoholic Liquors" 1, 2, 3
Sherman Anti-Trust Act of 1890, Section 1, as amended by the Miller-Tydings Act of 1937, (26 Stat. 209 as amended, 15 U. S. C. Section 1) 3, 4
United States Code, Title 28, Section 1257(2) 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 420

MEYER SCHWARTZ, HAROLD L. COLEMAN, DAVID LEFFERMAN, ET AL.,

Appellants,

vs.

JOHN C. KELLEY, GOODWIN B. BEACH AND T. EMMET CLARIE, MEMBERS OF THE LIQUOR CONTROL COMMITTEE OF THE STATE OF CONNECTICUT

STATEMENT AS TO JURISDICTION

Statement of the Case

This proceeding was originally brought in the Superior Court of the State of Connecticut in Fairfield County, to restrain the defendants in that action, who are the appellees in this action, all members of the Liquor Control Commission of the State of Connecticut, from enforcing any of the provisions of Public Act Number 200 (General Statutes of Connecticut, Cum. Sup. 1951 Sections 904b-907b). The temporary injunction prayed for in the complaint, in said action was denied on September 27, 1951. The permanent injunction prayed for in the complaint was denied by Memorandum of Decision dated June 9, 1952,

EED THROUGH POOR COPY

whereupon an appeal to the Supreme Court of Errors of the State of Connecticut was duly filed and taken the decision of which appeal found no error in the holdings of the Court below (the opinion of the Supreme Court of Errors of the State of Connecticut is attached hereto as Appendix "B").

The appellants are permittees duly authorized by the aforementioned Liquor Control Commission to engage in the retail sale of packaged alcoholic liquors for off premises consumption in their respective places of business in various towns and cities located in Fairfield County in the State of Connecticut. Public Act Number 200 (General Statutes of Connecticut, Cum. Sup. 1951 Sections 904b-907b) "An Act Concerning the Posting of Prices of Alcoholic Liquors" became effective June 1, 1951, as therein provided.

In general, the act requires, as a prerequisite to the sale of branded or labelled packaged alcoholic liquors by out-of-state shippers, manufacturers or wholesale permittees that they file minimum consumer resale prices with the Liquor Control Commission and that the prices filed shall be uniform throughout the State of Connecticut. The latest effective date for the commencement of minimum consumer resale price control for the liquor industry in Connecticut was October 1, 1951.

Pursuant to said act, retail permittees cannot sell at a price which is less than the posted minimum consumer resale price. The act provides severe penalties for violation of any of its provisions, and these penalties may take the form of suspension of permits or revocation or cancellation of permits or a fine of not more than One Thousand Dollars, or imprisonment of not more than One year or both a fine and imprisonment.

The opinion of the Court which is attached hereto as Appendix "B" based upon the Federal Questions and sus-

tained the decision of the Superior Court as against appellants' claims that Public Act Number 200 enacted by the 1951 General Assembly of the State of Connecticut (General Statutes of Connecticut, Cum. Sup. 1951, Sections 904b-907b) is repugnant to the so-called "due process" clause of the Fourteenth Amendment to the Constitution of the United States, that it is violative of the Sherman Anti-Trust Act (26 Stat. 209 as amended, 15 U.S.C. Sec. 1) and that it is repugnant to the so-called "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States.

Opinions Below

The opinion of the Superior Court of the State of Connecticut held in Fairfield County by Mellitz, J., is attached hereto as Appendix "A". The opinion of the Supreme Court of Errors of the State of Connecticut is attached hereto as Appendix "B".

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257(2) of Title 28 of the United States Code.

Statute of the State Involved

The statute of the State the validity of which is involved, is Public Act Number 200 enacted by the 1951 General Assembly of the State of Connecticut (General Statutes of Connecticut, Cum. Sup. 1951, Sections 904b-907b).

Date of Judgment and of Application for Appeal

The opinion and judgment of the Supreme Court of Errors of the State of Connecticut was rendered on July 21,

EED THROUGH POOR COPY

1953 (Appendix "B" hereto). The petition for appeal was presented on September 24th, 1953.

Cases Believed to Sustain Jurisdiction

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are:

U. S. Automobile Workers v. *O'Brien*, 339 U. S. 454, 70 S. Ct. 781;
LaCrosse Telephone Corp. v. *Wisconsin Employment Relations Board*, 336 U. S. 18, 69 S. Ct. 379;
Bethlehem Steel Co. v. *N. Y. State Labor Relations Board*, 330 U. S. 767, 67 S. Ct. 1026;
Turner v. *Pennsylvania*, 338 U. S. 62; 69 S. Ct. 1352;
Wolff v. *Colorado*, 338 U. S. 25, 69 S. Ct. 1359;
Gibbs v. *Burke*, 337 U. S. 773, 69 S. Ct. 1247;
Shelley v. *Kraemer*, 334 U. S. 1, 69 S. Ct. 836;
Primkemp v. *Florida*, 328 U. S. 331, 66 S. Ct. 1029.

Raising the Federal Questions

Paragraph 14 of the appellants' complaint filed with the Superior Court of the State of Connecticut, in the County of Fairfield, on October 10, 1951 attacked Public Act Number 200 of the Connecticut General Assembly of 1951 (*supra*) as being illegal in that it violates Section 1 of the Sherman Anti-Trust Act of 1890, as amended by the Miller-Tydings Act of 1937 (*supra*) because the delegation of minimum price fixing powers to out-of-state shipper, manufacturer and wholesaler permittees results in a combination or a conspiracy in restraint of trade in violation of the provisions thereof.

In Paragraph 15 of said complaint, the appellants' attacked the validity of Public Act Number 200 of the 1951 Connecticut General Assembly on the grounds that it is unconstitutional, in that it deprives the appellants of property without due process of law contrary to the provisions of the Fourteenth Amendment to the Constitution of the

United States, because the provisions of said act are arbitrary, unreasonable and bear no rational relation to the purposes of said act, because the provisions provide for an unreasonable delegation of power, because the provisions contain no ascertainable standards whereby the State Liquor Control Commission may be guided in carrying out said act and in promulgating regulations thereunder, because said act deprives the appellants of their right to conduct a lawful business in a lawful manner, because there is no public necessity for the imposition of minimum consumer resale prices and because the provisions of said act deprive the appellants of the equal protection of the laws.

These federal questions were expressly passed upon by the Superior Court of the State of Connecticut (see Appendix "A"). These federal questions were again raised upon appeal in appellants' assignment of errors filed October 30, 1952 with the Superior Court of the State of Connecticut, in Fairfield County and in appellants' draft finding filed August 5, 1952, in the Superior Court of the State of Connecticut, in Fairfield County and they were again expressly passed upon by the Supreme Court of Errors of the State of Connecticut (see Appendix "B").

Statement of the Grounds upon Which it is Contended the Questions Involved Are Substantial

1. Public Act Number 200 violates the provisions of Section 1 of the Sherman Anti-Trust Act of 1890 as amended by the Miller-Tydings Act of 1937 (*supra*) and is, therefore, invalid.

A. PUBLIC ACT NO. 200 HAS A DIRECT, IMMEDIATE AND PROXIMATE EFFECT ON INTERSTATE COMMERCE AND IS THEREFORE WITHIN THE SCOPE OF THE SHERMAN ACT.

Practically all of the packaged alcoholic liquors sold in Connecticut, especially those sold under known brand labels,

ED THROUGH POOR COPY

are manufactured and bottled out of state. They are shipped by out-of-state shippers to wholesaler or manufacturer permittees for redistribution to retailer permittees. Since Public Act No. 200 gives out-of-state shipper permittees power to fix minimum consumer resale prices for their brands shipped into Connecticut from out of state, interstate commerce is directly affected. Interstate commerce is indirectly affected by the requirement of the filing of minimum consumer resale prices by wholesaler permittees who are the exclusive agents of out-of-state brand owners not licensed by the Liquor Control Commission because the minimum consumer resale prices will for all intents and purposes be set by the out-of-state brand owners as part of their home office pricing policies.

The price fixing powers under this act transcend state lines because the statute regulates commodities which are imported from one state to another. *Nat'l. League, etc.* v. *Federal Baseball Club,* 259 U. S. 200, 66 L. Ed. 898, (1921). Any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation and delivery of an article of interstate commerce by preventing or restricting its sale, thereby regulates interstate commerce to such extent. *U. S.* v. *National Retail Lumber Dealers Ass'n.,* 40 F. Supp. 448 (1941). That the ultimate object of a conspiracy charged was the fixing of local retail prices did not of itself remove it from the scope of Section 1 of the Sherman Anti-Trust Act where means for the accomplishment of the conspiracy reached beyond state boundaries. *U. S.* v. *Frankfort Distilleries,* 324 U. S. 293, 89 L. Ed. 951. The federal government may under Section One of the Anti-Trust Act regulate local commerce which is intimately related to interstate commerce or local activity which obstructs or burdens interstate commerce. *U. S.* v. *General Motors Corp.,* 121 F. 2d 376 (1941).

B. STATE STATUTES WHICH ATTEMPT TO REGULATE AND ENFORCE PRICE FIXING OF GOODS IN INTERSTATE COMMERCE IN CONTRADICTION TO THE FEDERAL ANTI-TRUST LAWS ARE UNCONSTITUTIONAL.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: Provided that nothing contained in section 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to interstate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, that the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. . . ."
15 U. S. C. A. Sec. 1

The Sherman Anti-Trust Act of 1890 set a policy of free competition and monopoly regulation by the Federal government. It made illegal all price fixing agreements between distributors and retailers on goods in interstate commerce. The Miller-Tydings Amendment was added to

the act in 1937 to make valid price fixing agreements on a horizontal basis when such agreements were arrived at voluntarily and when allowed by state fair trade laws. Prior to this amendment such price fixing agreements in interstate commerce were contrary to Federal statutes even though state statutes may have attempted to grant a protective cloak to such agreements.

In 1951 the Supreme Court of the United States in *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951) held that the Miller-Tydings Amendment was devised to grant immunity from the anti-trust laws to signers of price fixing agreements and when a Louisiana statute attempted to impose price regulation on non-signers the Court said this was contrary to the Congressional intent and would have a "vast and devastating effect on Sherman Act Policies" *Schwegmann Brothers* v. *Calvert Distillers Corp, supra,* 389 (1951) therefore, the Plaintiff's scheme in that case was not exempt and thus the state law authorizing it had to give way. They could not find immunity in the state law. The case kept state action strictly within the bounds set by Congressional legislation.

The proponents of Fair Trade then came back with the "McGuire Bill", an amendment to the Federal Trade Commission Act 15 U. S. C. A., Sec. 45 which now exempts from the anti-trust laws state price fixing regulations that bind non-signers to price agreements reached by a voluntary contract between an out-of-state distributor and an in-state dealer. Again we see that it is with Congressional permission that the state is allowed to act in this field. That is the present status of price fixing regulations by the states with a constitutional test now being readied for the courts of the "McGuire Act" by the same Schwegmann Brothers.

We can glean from this history of price fixing that it is only within the bounds of Federal legislation that the state

can act in enforcing price agreements when such agreements affect goods in intertsate commerce. With this background in mind the appellants contend that the State of Connecticut in Public Law No. 200 is overstepping this area set up by Federal legislation by making mandatory the setting of minimum consumer resale prices in the liquor industry. Public Law No. 200 does not require that there be a voluntary contract between any distillers and their retailers, in fact there are no contract agreements involved whatsoever. It is merely an attempt by the state to immunize liquor dealers from the effect of anti-trust laws by giving them complete freedom to set compulsory retail prices and to legislate in their own interests, by using the guise of state authority. Upon the fact of such a statute appear enormous possibilities for the stifling of competition to benefit an economic group. Where is the state action but to act as a conduit for the enforcing of prices solely decided by one group? There are no signers to bind non-signers. There are merely business men who are forced to accept a selling price for their goods and no power of determination whatsoever on their part as to what that price shall be. This is restraint of trade and monopoly at its worst. If voluntary agreements in price fixing can be exempted from Federal anti-trust acts only by congressional permission, then certainly non-voluntary price fixing must require such exemption.

Is a state itself restrained from acting contrary to the Sherman Anti-Trust act? Can a state adopt a legislative policy regulating private industry when anti-trust laws prevent an individual or corporation from such action even with state immunity? The Supreme Court in *Parker* v. *Brown*, 317 U. S. 341 (1943) upheld a form of state action in regulating the raisin industry of California where much of the raisin crop was destined directly for interstate commerce. California set up a program of fixing prices, allocat-

ing and limiting both the quantity and quality of the crop to be sold, and establishing a complete monopoly power over the raisin industry. Why was this state action upheld where the state action in the *Schwegmann* case was held to be invalid? How can the Parker case and the *Schwegmann* case be reconciled? The appellants submit that the *Schwegmann* case put a limitation on the Parker decision and they can be reconciled only on the following theory. When a state restrains competition through direct, positive controls it must be expected that adequate safeguards will be provided by the state to prevent unreasonable results; that is, the state will provide an adequate substitute for the safeguards offered by competition. This theory is supported by the fact that the California raisin regulations (*Parker* v. *Brown supra*) provided for state supervision of prices and practices. Furthermore, in the California program both initiation and enforcement of Fair Trade prices were in part supervised by state officials. At every step of the price fixing in the program there was a statutory prescription of public hearing and scrutiny by the California Secretary of Agriculture. Does our Public Law No. 200 offer an adequate substitution for the safeguards provided by competition? There are absolutely no state safeguards of any kind provided in Public Law No. 200. The holdings of the United States Supreme Court in the *Parker* and *Schwegmann* cases make invalid such unsupervised grants of power by the state to replace normal competition.

But even if a state is deemed completely immune from an action brought under the Sherman Anti-Trust Act in regulating private conduct, may it confer such immunity upon private persons under the guise of a completely standardless statute? If we grant that a state is protected when it determines that it must set state prices in its promotion of public morals, temperance, etc., can it free all individuals

from the effect of the anti-trust acts? If this is so then the states will be authorized to allow restraints of trade at will. This is contrary to all the American policies against restraining free and natural competition. Public Law No. 200 is a Fair Trade Act without any contract signers, without any standards, without any supervision, completely stifling competition in a huge market under the guise of a liquor control bill.

Though Public Act No. 200 may be entitled "An Act Concerning the Posting of Prices of Alcoholic Liquors," it is a minimum resale price bill applicable only to the liquor industry. The state is attempting to evade the national policy and anti-trust laws of the United States by hiding under the cloak of a price posting bill. No matter what the act is entitled and no matter how camouflaged, it is a minimum consumer resale price fixing bill for it follows closely Section 101 (c) of the New York State Alcoholic Beverage Control Law, entitled Minimum Consumer Resale Prices (see McKinney's Consolidated Law of New York). We submit that the bill must be judged as to its contents and not merely by its title.

That a segment of American Industry can legislate in its own behalf under the guise of protecting the public from "demon rum" is completely inimical to our system of free competition, and invalid under the Federal Anti-Trust statutes and cases.

2. Public Act Number 200 violates the Fourteenth Amendment of the Constitution of the United States because it deprives the appellants of liberty and property without due process of law.

The act deprives the appellants of their property without due process of law and it does not constitute a valid exercise of the police power in that the attempted exercise of the police power bears no relationship to the object to be ob-

tained, which in this instance is said to be the promotion of intemperance.

Tyson v. *Benton*, 273 U. S. 418, 430 (1936);
U. S. v. *Frankfort Distillers*, 324 U. S. 293 (1945);
Lochner v. *People of New York*, 198 U. S. 45 (1905).

This act which sets up minimum consumer resale prices in the packaged liquor industry is liquor sold for off premises consumption is not a valid method for promoting temperance which has been found to be the purpose of the act. It is further submitted that the said act has no valid purpose other than to control resale prices and to thereby give the liquor industry a favored opinion by making it a ward of the state. The act is unreasonable and bears no relationship to any legislative purposes stated or assumed and therefor violates the Fourteenth Amendment to the Constitution of the United States, because it deprives the appellants of their property and of their liberty to contract without due process of law.

Conclusion

We, respectfully submit that the Supreme Court of the United States has jurisdiction of the Appeal.

Dated at Norwalk, Connecticut, this 24th day of September, A. D. 1953.

Respectfully submitted,

ABRAHAM DAVIS SLAVITT,
Counsel for Appellants.

SLAVITT & CONNERY,
Of Counsel.

APPENDIX "A"

OPINION OF THE SUPERIOR COURT OF THE STATE OF CONNECTICUT—Filed June 9th, 1952

MEMORANDUM OF DECISION OF MELLITZ, J.

This is a suit to restrain the defendants who compose the Liquor Control Commission of the State of Connecticut, from enforcing the provisions of Sections 904v-907v of the 1951 Supplement to the General Statutes, enacted as Public Act No. 200 at the 1951 session of the General Assembly. The plaintiffs are permittees engaged in the retail sale of packaged alcoholic liquors for off premises consumption under liquor package store permits issued by the Liquor Control Commission. In general, the Act requires, as a prerequisite to the sale of branded or labelled packaged alcoholic liquors by out-of-state shippers, manufacturers or wholesale permittees that they file a schedule of minimum consumer resale prices with the Liquor Control Commission and that the prices filed shall be uniform throughout the state. Retail permittees are prohibited, under penalties provided in the Act, from selling at less than the scheduled minimum consumer resale price then in effect.

The plaintiffs attack the validity of the Act on the ground that the price fixing power lodged in segments of the liquor industry is an illegal delegation of legislative power, and that it violates the Sherman Anti-Trust Act and the due process and equal protection clauses of the Constitution of the State of Connecticut and that if the United States.

The law is designed to regulate and control the distribution and sale of alcoholic liquor. The propriety of legislation to that end, in the exercise of the police power of the state has long been recognized, and is not questioned. Since the 21st amendment to the United States Constitution, a state may absolutely prohibit the manufacture, transportation, sale or possession of intoxicants. It has a "large discretion as to the means employed to protect the citizens against the evil incident to the liquor traffic * * * The business being one which admittedly may be dangerous to public health, safety and morals, the scope of the legislature's power to

regulate it is much broader than in the case of its regulation of an ordinary lawful business essential to the conduct of human affairs." *Francis* v. *Fitzpatrick*, 129 Conn. 619, 622. Having the power to entirely prohibit the business, the legislature may drastically regulate it, if it deems best for society. *State* v. *Zazzara*, 128 Conn. 160, 166.

With the wisdom of the means to be adopted to deal with the liquor industry the courts have nothing to do, so long as constitutional requirements are met.

> "It is not the concern of courts to pass upon the economic advantages or disadvantages of particular acts of legislation regulating business. Such matters are for the legislature to determine. They come within the purview of the state's police power. The only function of the courts is to determine whether the object of the legislative enactment is within the power of the legislature, and, if so, whether the statute bears a reasonable and substantial relation to the object sought to be accomplished and is not arbitrary or discriminatory. If the answer is in the affirmative, the requirement of due process is met. 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. *Northern Securities Co.* v. *U. S.*, 193 U.S. 197, 337-8. And it is equally clear that if the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise. With the wisdom of the policy adopted, with the adequacy of practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. *Nebbia* v. *N.Y.*, 291 U.S. 502, 537' ". *Carroll* v. *Schwartz*, 127 Conn. 126, 129.

An act of the legislature is to be held unconstitutional only if there is no reasonable ground upon which it can be sustained. Every presumption and intendment must be made in its favor. *Lyman* v. *Adorno*, 133 Conn. 511, 514. The burden of showing that it does not rest upon any reasonable

basis is upon him who asserts illegality and the court "must assume the existence of any state of facts which can reasonably be conceived of as existing at the time of the enactment of the law." *Carroll* v. *Socony-Vacuum Oil Co.*, 136 Conn. 49, 65.

The Act here in question appears to be simply an extension to the consumer level of a method of control which has gradually been evolved by the legislature in its efforts to deal with practices in the liquor industry deemed inimical to the public welfare. For example, Sec. 4306 of the Revised Statutes requires that liquor sold under a brand or trade name shall be registered with and approved by the Liquor Control Commission; prohibits discrimination in price discounts between permittees; and requires the establishment of and posting of the price of any brand of liquor, the posted price to be controlling for the month following posting, in sales from a manufacturing or wholesale permittee to the retail permittee. Sec. 4306 evolved into its present form by a series of amendments to the Liquor Control Act passed by the legislature in 1941, 1945 and 1947. Its validity was sustained in *State ex rel American Distilling Co.* v. *Patterson*, 133 Conn. 345; and it is illuminating, in passing, to recall the circumstances of the case as illustrative of the constant vigil required of the legislature to protect the public interest by appropriate legislation. A manufacturer there sought the aid of the courts to destroy the safeguards of Sec. 4306 and compel the Liquor Control Commission to approve a brand of liquor less than one month old and barely meeting the minimum requirements of federal regulations, which the manufacturer sought to market under a label conspicuously designating the liquor as "Private Stock Whiskey" and as "A superb quality whiskey of excellent character and distinctive flavor".

Price control is a well recognized means of regulating the liquor traffic to correct evils and avoid abuses incident to it. *Gaine* v. *Burnett*, 122 N.J.L. 39, 4 Atl. (2nd) 37; *Reeves* v. *Simons*, 289 Ky. 793, 160 S.W. (2nd) 149; *Gipson* v. *Morley*, 217 Ark. 560, 233 S.W. (2nd) 79.

The legislature has chosen by the Act here, to cope with certain aspects of liquor control, through the medium of

resale price maintenance at the consumer level. By this means the legislature seeks "to eliminate price wars which unduly stimulate the sale and consumption of alcoholic liquors", this being one of the statement of purposes which accompanied the bill before the legislature in accordance with legislative practice. The plaintiffs say that despite this stated purpose the fundamental nature of the law is purely that of a price-fixing law which enables out-of-state shippers, manufacturers and wholesalers, as the repositories of absolute and unlimited power to fix prices, to regulate and control the business affairs of all retail package stores throughout the state; that in the area of price regulation, where interstate commerce is affected, the police power of the state must yield to the Commerce Clause of the United States Constitution; and that the law is of the type of compulsory minimum resale price maintenance legislation held to be invalid in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384.

The Miller-Tydings Amendment of the Sherman Anti-Trust Act made vertical agreements prescribing resale prices for trademarked goods immune from the Sherman Act where such contracts are lawful, as to intrastate transactions in the state of resale. The *Schwegmann* case held that the Miller-Tydings Amendment did not permit the imposition of price-fixing on persons who had not voluntarily entered into a vertical agreement prescribing minimum resale prices. It held, in other words, that compulsory resale price maintenance could not be imposed upon one who did not voluntarily become a party to a vertical agreement sanctioned by the Miller-Tydings Amendment. Here we are not dealing with voluntary contracts or contracts of any kind. The price maintenance requirement here does not flow from any contractural relationship authorized by the legislature pursuant to the exemptions of the Miller-Tydings Amendment, but is a requirement upon all who deal in the sale of liquor by the direct act of the legislature itself. In *Parker* v. *Brown*, 317 U.S. 341, 350, the United States Supreme Court has held that the Sherman Act itself does not apply to prohibit state action of this kind. It held that the Sherman Act "must be taken to be a prohibition of individ-

ual and not state action." *Parker* v. *Brown* was referred to and cited with approval in the *Schwegmann* case. Nothing in the legislation here sanctions combinations between dealers to fix prices or to enter into horizontal resale price agreements in contravention of the Sherman Act. The evils apprehended by the plaintiffs as the consequence of the legislation will require the further attention of the legislature if and when such consequences become manifest, but until the operation of the law establishes the contrary, the legislature has the right to anticipate that free and open competition between the elements of the liquor industry in whom the power resides under the law to fix resale prices will accomplish the ends sought by the legislature.

The attack on the law as a violation of the Commerce Clause of the federal constitution finds no support in the decisions of the United States Supreme Court. In a series of cases it has been firmly established that since the 21st amendment, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause; nor are state regulations discriminating aganst imported liquor prohibited by the equal protection clause of the 14th Amendment. *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U.S. 391; *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59; *Mahoney* v. *Triner Corp.*, 304 U.S. 401. The concurring opinion of Justice Frankfurter in *U. S.* v. *Frankfort Distilleries*, 324 U.S. 203, 301, is apt: "If a state for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the 21st amendment gives it that power and the Commerce Clause does not gainsay it."

The Plaintiffs contend further that the law is unconstitutional as an invalid delegation of legislative power in that the legislature has committed to units of the liquor industry the power to fix prices without establishing any primary standards as a guide. Cases like *State* v. *Stoddard*, 126 Conn. 623, involving the validity of legislation committing price fixing power to an administrative body

or other group are irrelevant to the consideration of the question here. The law here delegates nothing. To neither the Liquor Control Commission nor anyone else does the legislature delegate the power to classify liquor into types or grades and set minimum prices for each as was done with regard to milk by the milk administrator in the *Stoddard* case. Here the law requires, through a system of price posting, that a given brand of liquor be sold at a uniform price throughout the state. Liquor which is chemically identical may be sold at different prices provided it is sold under different brand names. Competition between brands is in no way affected or controlled by the law, nor is there any sanction for a lessening of competition through concerted action or otherwise. There is nothing in the law here "to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others." *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U.S. 183, 194.

Nor does the act violate the equal protection clauses of the state and federal constitutions. It applies equally and uniformly to all manufacturing, wholesale and retail permittees dealing in liquor sold for off-premises consumption. All within the class are treated alike. The classification is a reasonable one to effectuate the purpose intended. *Francis* v. *Fitzpatrick*, 129 Conn. 619. A law which operates upon all within the class equally will not be open to the charge of being discriminatory. *State* v. *Cullom*, 110 Conn. 291, 294.

As has already been noted, questions of public policy involved in regulations dealing with the price of intoxicating liquors are for the legislature and not within the province of the courts to adjudicate. The legislature is the judge of what is necessary for the public welfare and its judgment will not be disturbed unless palpably in excess of legislative power. The act is not vulnerable in the respects charged by the plaintiffs.

A brief has been filed in behalf of the United States by Counsel of the Hartford District of the Office of Price Stabilization as amicus curiae, urging that the enforcement of the Act be restrained on the ground that any conflict

between ceiling prices promulgated under the authority of O.P.S. regulations and minimum consumer resale prices which may be posted under the Act must be resolved in favor of the authority of the Office of Price Stabilization. The plaintiffs have made no claim that there is such a conflict and that there is, therefore, no occasion to consider whether such a conflict does exist.

Judgment may enter for the defendants to recover costs.

MELLITZ, *J.*

APPENDIX "B"

OPINION OF THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT—July 21st, 1953.

MEYER SCHWARTZ, et al.,

v.

JOHN C. KELLY, et al.

INGLIS, *J.:*

In this action the plaintiffs, a group of package store permittees, seek to enjoin the liquor control commission from enforcing Public Act No. 200, enacted by the 1951 General Assembly (General Statutes, Cum. Sup. 1951, 904b-907b). The trial court rendered judgment for the defendants and from that judgment the plaintiffs have appealed.

The act in question provides that no out-of-state shipper, manufacturer or wholesaler permittee shall sell or offer for sale any alcoholic liquor the container of which bears a label stating the brand or the name of the owner or producer, unless a schedule of minimum consumer resale prices for each brand has been filed with the liquor control commission and such schedule is then in effect. An exception is made providing that permission for such sale or offer may be granted by the liquor control commission "for good cause shown and for reasons not inconsistent with the purposes of (the act), and under such terms and conditions as the liquor control commission deems necessary." Cum. Sup. 1951, 904b.

The schedules of retail prices so filed are to continue operative for such periods as the commission shall specify, not exceeding four months, and are to be given wide publicity in various prescribed ways. The act further provides: "No permittee authorized to sell alcoholic liquor at retail for off-premises consumption shall sell, offer to sell, solicit an order for or advertise any alcoholic liquor at a price less than a minimum consumer resale price then in effect, unless written permission of the liquor control commission is granted for good cause shown and for reasons not inconsistent with the purposes of (the act), and under such terms and conditions as the liquor control commission deems necessary." 904b (c). The commission is authorized (905b) to adopt regulations for the enforcement of the act and to permit noncompliance when practical difficulties or unnecessary hardships will otherwise ensue. A violation of the act or any regulation thereunder is punishable by suspension or revocation of the violator's permit and by other penalties. 906b.

The claim of the plaintiffs is that the act is unconstitutional on three grounds: (1) It violates the due process clauses of both the federal and the state constitutions, (a) because it is not within the police power and (b) because it is discriminatory; (2) it provides for an improper delegation of legislative power; (3) it contravenes the interstate commerce clause of the federal constitution.

In passing upon the constitutionality of a statute, a court is bound to make every presumption and intendment in favor of the statute and to sustain it unless it is clearly invalid. *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 586, 87 A. 2d 139; *Mills* v. *Gaynor*, 136 Conn. 632, 637, 73 A. 2d 823; *Lyman* v. *Adorno*, 133 Conn. 511, 514, 52 A. 2d 702. This fundamental principle applies with full force in the determination of whether a statute is within the police power and, therefore, does not deprive a person of his liberty or property without due process of law. In such a consideration it is not for the court to pass upon the economic advantages or disadvantages of the statute. It is not for the court to say whether the legislation is wise. The court's only function is to determine whether the object

of the enactment is within the power of the legislature and, if so, whether the particular statute bears a reasonable and substantial relation to the object sought to be accomplished and is neither arbitrary nor discriminatory. *Carroll* v. *Schwartz*, 127 Conn. 126, 129, 14 A. 2d 754.

Although the act here in question does not contain a statement of the objects sought to be accomplished, the purposes which the General Assembly had in mind adopting it are easily discernible. They were both to promote temperance in the consumption of intoxicating liquor and, by stabilizing the industry, to encourage the observance of the Liquor Control Act by those who are permitted to sell liquor not to be consumed on the premises. It may reasonably be presumed that, without the establishment of a minimum retail price for branded liquor, price wars among retail dealers are apt to occur. The cutting of prices which occurs during such wars may induce persons to purchase, and therefore consume, more liquor than they would if higher prices were maintained. Moreover, the cutthroat competition which ensues is apt to induce the retailers to commit such infractions of the law as selling to minors and keeping open after hours in order to withstand the economic pressure. To prevent the occurrence of such conditions promotes public health, safety and welfare. Like all reasonable restrictions on the liquor traffic, such a purpose is well within the police power of the state. *Francis* v. *Fitzpatrick*, 129 Conn. 619, 621, 30 A. 2d 552; *State* v. *Zazzaro*, 128 Conn. 160, 166, 20 A. 2d 737; *Crowley* v. *Christensen*, 137 U.S. 86, 90, 11 S. Ct. 13, 34 L. Ed. 620.

To accomplish this purpose, the General Assembly has, in this instance, adopted the method of permitting wholesalers to fix minimum prices at which each brand of liquor may be sold at retail. Price fixing is well recognized as a method reasonably suited to effectuate such a purpose, and therefore, is not a violation of due process. *Burroughs Wellcome & Co.* v. *Johnson Wholesale Perfume Co.*, 128 Conn. 596, 601, 24 A. 2d 841; *Nebia* v. *New York*, 291 U.S. 502, 537, 54 S. Ct. 505, 78 L. Ed. 940. Clearly, the act which requires wholesalers as a condition of doing business in this state to schedule minimum prices at which their brands of

liquor may be sold and prohibits permittees from selling at retail for less than those prices is within the police power of the state.

Legislation, even though it is within the police power, may be violative of due process if it is discriminatory in that it deals differently with different classes of persons without the existence of some natural and substantial difference, germane to the subject and purposes of the legislation, between those within the class included and those whom it leaves untouched. *State* v. *Cullum*, 110 Conn. 291, 295, 147 A. 804; *Lyman* v. *Adorno*, 133 Conn. 511, 521, 52 A. 2d 702. The plaintiffs claim that the act now before us indulges in such discrimination. The fact that the act treats those who deal in intoxicating liquor differently from those who deal in other commodities cannot be the basis for such a claim. Since the liquor traffic is a possible source of danger to the public which is not inherent in other businesses, those who engage in it constitute a class which is subject to regulations which might not be properly applicable to others. *Francis* v. *Fitzpatrick*, 129 Conn. 619, 621, 30 A. 2d 552.

So far as wholesalers are concerned the act is not discriminatory, because wholesalers of liquor are all treated alike. They must all file their schedules of prices. See *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59, 61, 57 S. Ct. 77, 81 L. Ed. 38. The act does make a differentiation between permittees for the retail sale of liquor not to be consumed on the premises and other retail permittees. It does not apply to the latter. There is, however, a reasonable distinction between the two classes. There is not the same likelihood of a price war with its attendant evils among those who sell liquor by the drink as there is among those who sell it by the package. This distinction is one which is germane to the purposes of the legislation. To make illegal the retail sale of liquor at less than a minimum price by permittees authorized to sell for off-premises consumption only is not discriminatory to the extent that the act is thereby rendered unconstitutional.

Since the act is within the police power and is not discriminatory, it is not violative of the due process provi-

sion of the state constitution. Art. 1, Par. 9. For the same reasons, it is not in violation of the due process provision contained in Par. 1 of the fourteenth amendment to the United States Constitution. It has been uniformly held in other jurisdictions that similar statutes do not deprive a person of liberty or property without due process of law. *Gipson* v. *Morley*, 217 Ark. 560, 567, 233 S.W. 2d 79; *Reeves* v. *Simons*, 289 Ky. 793, 796, 160 S.W. 2d 149; *Gaine* v. *Burnett*, 122 N.J.L. 39, 43, 4 A. 2d 37; see *Matter of Levine* v. *O'Connell*, 275 App. Div. 217, 220, 88 N. Y. 2d 672.

The second broad claim of the plaintiffs is that the act is unconstitutional because it delegates legislative powers both to the wholesalers of intoxicating liquor and to the liquor control commission without prescribing standards to control the exercise of those powers. See *State* v. *Stoddard*, 126 Conn. 623, 628, 13 A. 2d 586. The act affects the wholesalers in only two ways. In the first place, it prohibits their doing business in this state until they have filed their schedules of retail prices. In the second place, it protects the property rights which they have in their respective brand names by prohibiting the sale of their branded liquors at cut rates. In filing the schedule of minimum retail prices to be charged for their liquor, they are not legislating. They are merely complying with the law enacted by the General Assembly. Their fixing of prices, by itself, does not have the force of law. It is the General Assembly that has directed that retailers shall not sell for less than the established prices. There has been no delegation of legislative powers to the wholesalers. *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corporation*, 299 U. S. 183, 194, 57 S. Ct. 139, 81 L. Ed. 109.

The claim that the liquor control commission is given legislative powers without controlling standards rests on the fact that the act permits the commission to waive the requirements of the act both as to wholesalers and retailers in special cases. The weakness of this contention lies in that there is a distinction, well recognized in the law, between statutes which delegate to an administrative board the power to put the statutory requirements into effect and statutes which merely give to such a board the power to

waive the requirements. Where the delegation is simply of the power to waive the provisions of the statute, the constitution does not require that standards to guide the granting of such waiver be set forth in the statute. *Dupont* v. *Liquor Control Commission*, 136 Conn. 286, 290, 71 A. 2d 84; *Thomas Cusack Co.* v. *Chicago*, 242 U.S. 526, 531, 37 S. Ct. 190, 61 L. Ed. 472. The act in question is not unconstitutional by reason of any delegation of legislative powers.

Finally, the plaintiffs contend that, inasmuch as the act purports to limit the transportation of goods between the states, it invades the field reserved to the Congress by the interstate commerce clause of the federal constitution (Art. I, Par. 8) and does so in a way which is violative of the Sherman Anti-Trust Act (26 Stat. 209, as amended, 15 U. S. C. Par. 1). Their argument is based on *Schwegmann Bros.* v. *Calvert Distillers Corporation*, 341 U.S. 384, 71 S. Ct. 745, 95 L. Ed. 1035. In that case the provision of the Louisiana Fair Trade Act (La. Gen. Stat. Ann. Par. 9809.1 1939) which required retailers to sell any branded product at a price specified by the wholesaler whenever any one retailer in the state had agreed with the wholesaler to sell the product at that price was held invalid.

The decision has no application to the case at bar. In the first place, the Fair Trade Act was brought into operation by a contract between a wholesaler and a retailer. Such a contract was a voluntary combination and for that reason, in so far as it affected interstate commerce, it was within the activities proscribed by the Sherman Act. The act under consideration does not come into operation by virtue of any agreement or combination among individuals. It is the act of each individual wholesaler acting independently which determines the minimum price to be charged by the retailers for his brand of liquor.

In the second place, the Louisiana Fair Trade Act applied to branded goods of all kinds. The act now before us applies only to branded intoxicating liquor. The difference is vital. The twenty-first amendment to the United States constitution provides in Par. 2: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of in-

toxicating liquors, in violation of the laws thereof, is hereby prohibited." The effect of this is to override the limitations contained in the commerce clause of the federal constitution in so far as state legislation controlling the importation of intoxicating liquor is concerned. By virtue of the twenty-first amendment the states are free to enact laws prohibiting, restricting or regulating the bringing of intoxicating liquors into their territories completely unfettered by the commerce clause. *United States* v. *Frankfort Distilleries, Inc.*, 324, U. S. 293, concurring opinion by Frankfurter, J., 300 65 S. Ct. 661, 89 L. Ed. 951; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138, 60 S. Ct. 163, 84 L. Ed. 128; note, 138 A.L.R. 1150, 1151; see *Ruppert* v. *Liquor Control Commission*, 138 Conn. 669, 674, 88 A. 2d 388; *Downer* v. *Liquor Control Commission*, 134 Conn. 555, 559, 59 A. 2d 290. It follows that the act now before us, even though it imposes a condition upon the importation into this state of alcoholic liquors, in no way contravenes the interstate commerce clause of the United States constitution.

There is no error.

In this opinion the other judges concurred.

No. 420. SCHWARTZ ET AL. *v.* KELLEY ET AL., MEMBERS OF THE LIQUOR CONTROL COMMITTEE. Appeal from the Supreme Court of Errors of Connecticut. *Per Curiam:* The appeal is dismissed for the want of a substantial federal question. *Abraham Davis Slavitt* for appellants. *William L. Beers,* Attorney General of Connecticut, and *Louis Weinstein,* Assistant Attorney General, for appellees. Reported below: 140 Conn. 176, 99 A. 2d 89.

BLEED THROUGH POOR COPY